Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
2002 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996	)	MB Docket No. 02-277
	)	MM Docket No. 01-235
Cross-Ownership of Broadcast Stations and Newspapers	)	
	)	MM Docket No. 01-317
Rule and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets	)	
	)	MM Docket No. 00-244
Definition of Radio Markets	)	

OPPOSITION TO PETITIONS FOR RECONSIDERATION OF UCC *et al.*

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SUMMARY

UCC *et al.* strongly oppose the requests of some broadcasters that the Commission eliminate its rule restricting common ownership of more than one top four ranked television station in small and medium sized markets. Elimination of the top four restriction would drastically reduce competition between broadcast television stations and permit a single owner to obtain a precariously high market share. Elimination of the top four restriction would also adversely affect diversity and localism by, for example, eliminating independently produced local news programming.

UCC *et al.* also oppose petitions by several radio broadcast owners regarding the local radio ownership rule. Without presenting new facts or evidence, several broadcast owners argued that the Commission acted arbitrarily and capriciously in replacing the contour-overlap market definition with Arbitron Metro markets. UCC *et al*. also disagree with the broadcast owners' arguments to expand the grandfathering provisions because this would perpetuate the ill effects of the contour-overlap method. Finally, UCC *et al.* support the Commission's decision to attribute Joint Sales Agreements due to the anti-competitive effect of Joint Sales Agreements.

TABLE OF CONTENTS

SUMMARY ii

I. THE FCC SHOULD RETAIN THE TOP FOUR RESTRICTION IN ALL LOCAL TELEVISION MARKETS BECAUSE IT IS NECESSARY TO PROTECT COMPETITION, DIVERSITY, AND LOCALISM. 2

A. The top four restriction is necessary to protect competition. 2

B. The top four restriction is necessary to ensure sufficient diversity in local news programming. 4

C. Elimination of the top four restriction is not necessary to television station survival. 5

II. THE COMMISSION SHOULD RETAIN THE LOCAL RADIO RULES ADOPTING THE ARBITRON METRO MARKET DEFINITION, LIMITING GRANDFATHERING PROVISIONS, AND ATTRIBUTING JOINT SALES AGREEMENTS. 6

A. The Commission should not reconsider its decision to define radio markets by Arbitron Metros 7

B. The Commission should not expand grandfathering provisions. 8

C. The Commission should attribute Joint Sales Agreements but should not grandfather JSAs entered into prior to the Order 10

CONCLUSION 12

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Pursuant to Section 1.429 of the Commission's Rules, the Office of Communication, Inc. of the United Church of Christ, Black Citizens for a Fair Media, Philadelphia Lesbian and Gay Task Force, and Women's Institute for Freedom of the Press ("UCC *et al.*"), by their attorneys, the Institute for Public Representation ("IPR"), submit the following Opposition to Petitions for Reconsideration regarding the Report and Order and Notice of Proposed Rulemaking, FCC 03-127 (rel. July 2, 2003) ("Order"). UCC *et al.* primarily submit this pleading to oppose the petitions of various parties who seek to further relax the local television and local radio rules.

I. THE FCC SHOULD RETAIN THE TOP FOUR RESTRICTION IN ALL LOCAL TELEVISION MARKETS BECAUSE IT IS NECESSARY TO PROTECT COMPETITION, DIVERSITY, AND LOCALISM.

The Commission correctly found that a single company's ownership of more than one top four ranked station in a single DMA would be detrimental to the public interest, and therefore retained its top four restriction. Nexstar and Lin ask the Commission to eliminate the top four restriction in all markets ranked below fifty.[1] Because the top four restriction is essential to protect competition, diversity, and localism in the television market, the Commission should reject the petitions of Nexstar and Lin and retain the top four restriction in all markets.

A. The top four restriction is necessary to protect competition.

The Commission found that the top four restriction is absolutely necessary to protect competition in the DVP market.[2] Elimination of the top four restriction would produce serious anticompetitive results. First, elimination of the restriction would allow mergers resulting in large increases in market concentration.[3] Highly concentrated markets increase the likelihood of collusion and market power and are thus presumptively anticompetitive.[4] Nexstar and Lin have submitted no argument to rebut this presumption. Second, elimination of the restriction would allow a single company to control a significantly larger market share than its competitors.[5] This would increase the likelihood of unilateral anticompetitive action.[6] Nexstar and Lin fail to

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[1] *See* Petition for Reconsideration of Nexstar Broadcasting Group, L.L.C. ("Nexstar Petition"), MB Docket No. 02-277, filed Sept. 4, 2003, at 1; Petition for Reconsideration of Lin Television Corporation and Raycom Media, Inc. (Lin Petition), MM Docket No. 02-277, filed Sept. 4, 2003, at 12.
[2] *See* Order at ¶¶ 195-200.
[3] *See* Order at ¶ 197.
[4] *See FTC v. Heinz*, 246 F.3d 708, 715 (D.C. Cir. 2001).
[5] *See* Order at ¶ 196.
[6] *See* FTC Merger Guidelines 2.2.

address this concern. Finally, the Commission concluded that retaining the top four restriction helps promote competition between the Big Four networks.[7] Nexstar and Lin do not even mention network competition.

The anticompetitive results that could arise from mergers among the top four stations in small and medium sized markets are dramatic. For instance, in the Johnstown-Altoona, Pennsylvania market (DMA Rank 99), elimination of the top four restriction would allow WJAC, an NBC affiliate with 38% local commercial share, to merge with WTAJ, a CBS affiliate with 42% local commercial share,[8] thus giving one company a combined local commercial share of 80%. In smaller markets, television stations could be owned by as few as two owners.

Nexstar and Lin wholly fail to address the harms that would result from eliminating the top four restriction in their petitions for reconsideration. Nexstar's argument that eliminating the top four standard would be pro-competitive amounts to nothing more than the conclusory statement that commonly owned stations will compete with each other for viewing audience.[9] Commonly owned stations do not compete with each other for viewers because there is no economic incentive for one station to take viewers from the other. Even if, as Nexstar suggests, two commonly owned stations would pursue a strategy of offering diverse programming to collectively reach the widest possible audience,[10] this strategy is one of *cooperation*, not competition. Thus, nothing presented by Nexstar or Lin undercuts the Commission's conclusion that the top four restriction remains essential to promote competition.[11]

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[7] *See* Order at ¶ 196.
[8] BIA Financial Network, Investing in Television Market Report 2003 (5th ed. 2003).
[9] *See* Nexstar Petition at 4.
[10] *Id.*
[11] *See* Order at ¶ 212.

B. The top four restriction is necessary to ensure sufficient diversity in local news programming.

Nexstar claims that removing the top four restriction would increase local news because under its quasi-duopoly relationships, it has actually increased the amount of local news coverage in some markets.[12] Nexstar cites as an example its production of a newscast for WFXP, a Fox affiliate in Erie, Pennsylvania, with whom Nexstar has a grandfathered time brokerage agreement.[13] Nexstar fails to mention that in Terra Haute, where it also has a quasi-duopoly relationship, Nexstar has refused to commit to even retaining an existing local news program.[14] In fact, there is reason to believe that companies like Nexstar, upon acquiring a second station within a market, will actually cut local news coverage. UCC *et al.* detailed several examples of this phenomenon in our comments.[15] In fact, Nexstar itself recently cancelled local newscasts on *both* stations it controls in Billings, Montana.[16]

Furthermore, the kind of "increase" in local news coverage that Nexstar promises to provide is largely illusory. For instance, of the eight members of Erie's WFXP's news team, six are also on the news team of WJET, the other Nexstar controlled television station in the Erie market.[17] When one station broadcasts a newscast that is substantially duplicative of the newscast of a co-owned station, the additional newscast has failed to serve the public's interest in

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[12] *See* Nexstar Petition at 8.
[13] *Id.*
[14] Ken Kerschbaumer, *'Duopoly' in Terre Haute: Nexstar runs two stations under shared-sales pact*, Broadcasting & Cable, May 19, 2003. When asked if the local newscast on one station of which Nexstar is taking control would continue, Nexstar COO Duane Lammers said, "It's something we have to study as we don't know what the economic impact will be and if it will be economically viable."
[15] *See* Comments of UCC *et al.*, MB Docket No. 02-277, filed Jan. 2, 2003, at 39.
[16] Jan Falstad, *KULR Sold: ABC-6/Fox-4 Drop Local News*, billingsgazette.com, Oct. 1, 2003, *at* http://www.billingsgazette.com/index.php?display=rednews/2003/10/01/build/local/34-tv.inc.
[17] WFXP web site, *Meet the Fox 66 Staff*, *at* http://216.87.159.44/staff.asp (last visited Oct. 2, 2003); WJET-TV web site, *Meet the Team*, *at* http://216.87.159.43/meet_team.asp (last visited Oct. 2, 2003).

localism. The Commission has properly recognized that one station's airing of children's educational programming already broadcast on a co-owned station does not increase the total amount of children's educational programming available.[18] This same reasoning applies to local television news coverage.

Diversity can also suffer when one station owner acquires a second station in the same market. Viewpoint diversity is reduced when two stations come under common ownership.[19] Viewpoint diversity is reduced even further when the co-owned stations share a news team. Without the top four restriction, viewers in a market with four stations could be left with just two local television news teams controlled by only two owners. The top four restriction is thus essential to protection of viewpoint diversity in small markets.

Finally, if a company can show that joint ownership of two top four stations in a single market would truly increase news and local programming, that company can seek a waiver of the top four restriction on those grounds.[20] Elimination of the top four restriction is thus wholly unnecessary.

C. Elimination of the top four restriction is not necessary to television station survival.

Both Nexstar and Lin claim that the financial condition of local television stations justifies creation of additional duopolies.[21] Lin claims that the low-rated affiliate station in small and medium sized markets, on average, showed negative profitability in 2001.[22] The same study,

[18] *See* Order at ¶ 183.
[19] *See* Order at ¶ 174.
[20] *See* Order at ¶ 230.
[21] *See* Nexstar Petition at 10; Lin Petition at 4.
[22] *See* Lin Petition at 4.

however, shows that those same stations, on average, had positive cash flow.[23] Cash flow, not profitability, is the relevant standard for evaluating a broadcast station's financial viability.[24] If a station truly does struggle over an extended period of time, it may be eligible for a waiver as a "failing" station.[25] Thus elimination of the top four restriction is not necessary to save failing stations.

II. THE COMMISSION SHOULD RETAIN THE LOCAL RADIO RULES ADOPTING THE ARBITRON METRO MARKET DEFINITION, LIMITING GRANDFATHERING PROVISIONS, AND ATTRIBUTING JOINT SALES AGREEMENTS.

Several radio station owners filed petitions objecting to the replacement of the contour-overlap market definition with Arbitron Metro markets and proposing that the Commission either (1) reinstate the contour-overlap definition or (2) expand the already generous grandfathering provisions to allow for circumvention of the new rule. Additionally, Monterey Licenses opposes the attribution of Joint Service Agreements (JSAs) and suggests grandfathering JSAs entered into prior to the adoption of the Order. The radio station owners fail to bring forth any facts or evidence that the Commission did not already consider when making its decision. Petitions for reconsideration are not granted "for the purpose of debating matters which have already been fully considered and substantially settled,"[26] and "bare disagreement, absent new facts and argument . . . is insufficient grounds for reconsideration."[27] Moreover, UCC *et al.* are opposed to the radio station owners' proposals because they would result in increased consolidation at the expense of competition and diversity, contrary to the stated goals of the Commission.

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[23] *See* Comments of the National Association of Broadcasters, MB Docket No. 02-277, filed Jan. 2, 2003, at Attachment C, NAB Study.
[24] *See* Order at ¶ 221, n. 472.
[25] *See* Order at ¶ 221.
[26] *Regulatory Policy Regarding the Direct Broadcast Satellite Service*, 94 FCC 2d 741 ¶ 11 (1983).
[27] *Id.* at ¶ 12.

A. The Commission should not reconsider its decision to define radio markets by Arbitron Metros.

Several parties argue that the Commission acted arbitrarily and capriciously in replacing the contour-overlap market method with the Arbitron Metro market definition on the basis that the Arbitron market determination is flawed, profit-driven, and neither objective nor rational.[28] Petitioners fail, however, to present any new concrete evidence to support their arguments. In response to the December 2000 proceedings on the proper determination of radio markets and the appropriate method to count radio stations,[29] the Commission received numerous comments addressing the virtues and drawbacks of Arbitron, including comments that raised arguments identical to those petitioners made.[30] Additionally, the Commission acknowledges that the Arbitron method, like any other market-definition method, may cause anomalies.[31] In the event that a radio station combination would be in the public interest but is prohibited by the numerical limits of an Arbitron-defined market, the owner may apply for a waiver to correct the anomaly.

Cumulus Media contends that the Commission did not provide a reasoned analysis supporting its decision to utilize Arbitron Metro markets.[32] However, even Cumulus acknowledges that the Order identifies flaws of the contour-overlap method,[33] and the Order explains that the benefits of utilizing the Arbitron market determination outweigh the

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[28] Petition for Reconsideration of WJZD, Inc. (WJZD Petition), MB Docket No. 02-277, filed September 4, 2003, at 8-13; Petition for Reconsideration of WTCM Radio, Inc. (WTCM Petition), MB Docket No. 02-277, filed September 4, 2003, at 8-13; Petition for Reconsideration of Monterey Licenses, LLC (Monterey Petition), MB Docket No. 02-277, filed September 4, 2003, at 14-18.

[29] *See Definition of Radio Markets*, 15 FCC Rcd 25077 (2000).

[30] *See, e.g.,* NAB Comments in MM Docket No. 00-244 at 35; Cumulus Comments in MM Docket No. 01-317 at 24-25; Viacom Comments in MM Docket No. 00-244 at 6-7; Entercom Comments in MM Docket No. 00-244 at 5-6; Aurora Comments in MM Docket No. 00-244 at 7-11.

[31] *See* Order at ¶ 263.

[32] *See* Petition for Reconsideration of Cumulus Media Inc. (Cumulus Petition), MB Docket No. 02-277, filed September 4, 2003, at 10.

[33] *See* Cumulus Petition at 11-12.

disadvantages.[34] Accordingly, the Commission met its legal requirement of presenting a reasoned analysis.

Finally, Saga Communications argues that the Commission's reliance on Arbitron and BIA impermissibly delegates the Commission's legislative power to private entities.[35] If the use of a private entity to determine radio markets were an unconstitutional delegation of power, then the same problem would exist with the determination of DMAs in the local television rules because the use of Nielson ratings would also be an impermissible delegation of power.

B. The Commission should not expand grandfathering provisions.

Several radio station owners propose broadening the grandfathering provisions outlined in the Order.[36] UCC *et al.* oppose the proposals because the Order already contains grandfathering provisions protecting radio station clusters that do not comply with the numerical limits under the new market definition.[37] By allowing non-compliant radio clusters to remain intact, the Commission prolongs the deficiencies of the contour-overlap market determination methodology. Furthermore, grandfathering provisions lock in a competitive imbalance in favor of existing conglomerates because the non-compliant owner will own more stations than permitted by the limits to which all other owners must adhere.[38]

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[34] *See* Order at ¶¶ 239, 263, 273-278.
[35] *See* Petition for Reconsideration of Saga Communications (Saga Petition), MB Docket No. 02-277, filed September 4, 2003, at 5-8.
[36] *See* Cumulus Petition at 19; Petition for Reconsideration of Great Scott Broadcasting (Great Scott Petition), MB Docket. No. 02-277, filed September 4, 2003, at 5; Petition for Reconsideration of Entercom Communications Corporation (Entercom Petition), MB Docket. No. 02-277, filed September 4, 2003, at 7.
[37] *See* Order at ¶¶ 482-86.
[38] The Commission acknowledges this problem but dismisses it without explanation. *See* Order at ¶ 485.

Petitioners propose that the few restrictions on the grandfathering provisions actually be lifted to grant even more protection for non-compliant clusters. Specifically, Cumulus asks the Commission to remove the provision that eliminates the grandfathered status of non-compliant clusters upon sale or transfer of the cluster.[39] This proposal would lead to the perpetual application of the contour-overlap market definition to owners who benefit from it and its successors. The Commission determined that the contour-overlap determination fails to serve competition goals in local radio markets, so the unending application of this market definition is contrary to the public interest. Moreover, Cumulus bases its argument on the notion that "the limitation of grandfathered status deprives the existing owner of the financial benefits from a cluster that was assembled in reliance on the prior rule."[40] However, the financial impairment of investments made in reliance on the old rules does not render the new rules unlawful.[41]

Cumulus also argues that requiring station owners who filed applications for assignment and transfer of control that were pending on the adoption date of the Order to comply with the ownership limits of the Arbitron-defined markets constitutes secondary retroactivity.[42] Secondary retroactivity may occur when a rule with exclusively future effect impacts past transactions.[43] In conducting a legal analysis, secondary retroactivity is part of the determination

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[39] *See* Cumulus Petition at 19.
[40] *See* Cumulus Petition at 19.
[41] *See DirecTV v. FCC*, 110 F.3d 816 (D.C. Cir. 1997). The petitioners in *DirecTV* spent millions of dollars building satellites with additional transponders in reliance on a channel distribution policy announced in an FCC Order. The FCC later issued a rule announcing a different policy, and the petitioners claimed that the new rule was unlawful because of its effect on their prior investment. The Appeals Court held that the Commission's decision was not arbitrary and capricious because the Commission provided a reasoned explanation for the revision, despite the effect of the policy on petitioners' investment. *Id.* at 825.
[42] *See* Cumulus Petition at 16.
[43] *See, e.g., Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 219-220 (1998) (Scalia, J., concurring).

of whether or not the agency has acted arbitrarily or capriciously.[44] The court will consider whether the "disputed rules are reasonable, both in substance and in being made retroactive."[45] The Commission provided a reasoned explanation, based on the record, for the application of the new rule to the pending applications.[46] Therefore, the Commission did not act in an arbitrary and capricious manner, and the provisions applying the Arbitron method to pending applications does not amount to secondary retroactivity.

C. The Commission should attribute Joint Sales Agreements but should not grandfather JSAs entered into prior to the Order.

Monterey Licenses petitions the Commission to reconsider its conclusion that the attribution of Joint Sales Agreements (JSAs) best serves the public interest.[47] Though the Commission rejected past proposals to attribute JSAs, the Order reflects the Commission's reasoned determination based on the record that the attribution of JSAs is in the public interest. As acknowledged by Monterey, the Commission may alter its determination of what is in the best interest of the public as long as it provides a reasoned analysis for its decision.[48] The Commission specifically sought comment on the attribution of radio JSAs in the Local Radio Ownership NPRM.[49] As explained in the Order, based on the record that developed from the Local Radio Ownership NPRM, the Commission concluded that JSAs create an interest that

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[44] *See, e.g., Independent Petroleum Ass'n of Am. v. Dewitt*, 279 F.3d 1036, 1039 (D.C. Cir. 2002).
[45] *Id.* at 1039 (quoting *U.S. Airwaves, Inc. v. FCC*, 232 F.3d 227, 233 (D.C. Cir. 2000).
[46] *See* Order at ¶ 487 (explaining that the Commission sought comments on whether to allow assignment or transfer or control of grandfathered combinations that are non-compliant).
[47] *See* Monterey Petition at 1-2.
[48] *See id.* at 3; *see also Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 57.
[49] *See Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets,* 16 FCC Rcd 19861 (2001).

conveys significant influence over the core operations of the stations subject to the agreement and consequently have a negative impact on competition.[50]

UCC *et al.* also disagree with Monterey's suggestion to grandfather all JSAs entered into prior to the adoption of the Order.[51] As explained above,[52] grandfathering provisions merely perpetuate the ill effect that the new rule is intended to correct, so the Commission should take great caution in enacting such provisions. Monterey asserts that the Commission's decision to grandfather non-compliant ownership clusters but not JSAs is inconsistent.[53] Differential treatment is justified, however, because JSAs involve a significantly lower investment than buying a radio station. JSAs are merely agreements between a licensee and a brokering station regarding advertising time, whereas ownership agreements involve the purchase of the entire station. Moreover, limiting grandfathering provisions is consistent with the principles of contract law that govern agreements. By entering into a JSA, Monterey was on notice that the contract could be nullified by a change in the law,[54] and the two-year grace period granted by the Commission is more than adequate time to dissolve any JSAs that would put Monterey in non-compliance with the ownership limits.

[50] *See* Order at ¶¶ 316-325.
[51] *See* Monterey Petition at 7.
[52] *See infra* Section II.B.
[53] *See* Monterey Petition at 7-13.
[54] Contract law provides that a party to a contract can be excused from performance if there is a change in the law that renders lawful performance impossible.

CONCLUSION

For all of the above reasons, the Commission should deny the petitions for reconsideration seeking to further relax the local television and radio rules.

Respectfully Submitted,

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